IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 509

MORTON SOBELL, *Petitioner,*

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONSE TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

I.

The government's Supplemental Memorandum reveals no rational basis for its position that maximum-sentence prisoners must be credited with pre-sentence confinement *only* if they were sentenced after October 2, 1960. According to the government, the cut-off date is dictated by the reasoning of *Stapf* v. *United States,* 367 F. 2d 326. We believe that this is not a sound reading of *Stapf;* if it were, then *Stapf* is itself irrational.

At the time Sobell was sentenced, 18 U.S.C. § 3568 provided:

> "The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence.
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> If any such person shall be committed to a jail or other place of detention to wait transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
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> No sentence shall prescribe any other method of computing the term." (62 Stat. 838.)

On September 2, 1960, Congress amended the section, applicable to sentences imposed on or after October 2, 1960, to add the following proviso to the first sentence:

> "Provided, That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence." (74 Stat. 738.)

Subsequently, section 4 of the Bail Reform Act of 1966 amended § 3568, applicable to sentences imposed on or after September 20, 1966, so as to require the Attorney General to give a federal prisoner "credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." 80 Stat. 217.

The government as already noted concedes that by force of numerous court of appeals decisions (cited in our petition at p. 10) 18 U.S.C. § 3568 is to be interpreted so as to give credit for pre-sentence custody to persons sentenced between October 2, 1960 and September 20, 1966, to maximum sentences.

The reasoning of the cited cases, however, is equally applicable to persons who, like Sobell, were sentenced prior to October 2, 1960. Thus *Stapf* stated:

> "The legislative history [of the 1960 amendment to § 3568] reveals the assumptions and purposes of Congress: Congress was aware of and approved the general practice of federal courts to provide defendants credit against their sentence for time spent in jail for lack of bail. But in the absence of a statutory amendment a court did not have authority to give such credit to defendants sentenced for minimum term offenses. This situation, in the view of Congress, created an unwarranted disparity in the effective sentences of defendants convicted of minimum term offenses, in terms of total time in detention, between those who made bail and those who did not. To remove this disparity Congress amended § 3568 to provide an automatic credit for minimum term offenses. . . .
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> "*Congress made no provision in this amendment for defendants sentenced for offenses not carrying minimum terms of imprisonment . . . because it assumed that a credit for presentence custody for want of bail would continue to be provided by sentencing courts as a matter of course.*" (367 F. 2d at 328, footnotes omitted, emphasis supplied.)
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> "This is not a case, we reiterate, where Congress removed part of an evil but disclaimed action on the rest. This is a case, rather, where Congress

> acted as to the only evil that required legislative action, and assumed *that in all other instances equivalent relief would be provided by the courts.*
> . . .
> "The foregoing statutory and constitutional considerations compel us to hold that it was and is the duty of the sentencing courts to provide credit for presentence custody for want of bail to all defendants not granted credit administratively by virtue of the provisions of § 3568." (367 F. 2d at 329-30, footnotes omitted, emphasis supplied.)

The theory of *Stapf*, therefore, is that in enacting the 1960 amendment, Congress "assumed that a credit for presentence custody for want of bail would *continue* to be provided by sentencing courts as a matter of course," and "acted only on the evil that required legislation"[1]—that is, the inability of the courts to allow credit for pre-sentence custody where the statute required a minimum sentence.

Similarly, the court stated in *Bryans* v. *Blackwell*, 387 F. 2d 264, at 767, emphasis in original:

> "We agree with the Court of Appeals for the Fourth Circuit in the *Dunn* case and the District of Columbia Circuit in the *Stapf* case that persons sentenced prior to September 20, 1966, *who have not been given the benefit of uncounted time served* must be afforded the same benefits as are given to the mandatory minimum sentence prisoners under the 1960 amendment."

In sum, the holdings in *Stapf* and its progeny apply to Sobell's case even though he was sentenced prior to October 2, 1960.

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[1] The language in the *Stapf* case illuminates the remarks made by the sentencing judge, quoted at pp. 6-7 of our petition, that the months already served by petitioner "have to be so considered."

Indeed it would be impossible to construe § 3468 as requiring credit for jail time with respect to post-1960 sentences but not pre-1960 sentences. For nothing was changed by the 1960 amendment except the addition of the proviso confined to minimum mandatory sentence cases. The remainder of § 3568 stayed the same, and the same words must have meant the same before as well as after the 1960 amendment.

The Department of Justice itself originally construed *Stapf, Dunn* and *Smith* to require credit with respect to sentences imposed before 1960, although limiting that policy to prisoners sentenced in the District of Columbia, Fourth and Seventh Circuits. Policy Statement 7600.49. It is true that subsequent to the filing of the complaint in this case in which we complained that such a geographical limitation was arbitrary and capricious, the Bureau of Prisons issued a new policy statement, 7600.49A providing that the credit should be given nationwide but only to defendants who were sentenced after October 2, 1960. It is clear from the text of *Stapf,* however, that the Bureau was right in its first reading of the decision, and that *Stapf* need not be interpreted irrationally as the government now contends.

In its supplemental memorandum (p. 3) the government suggests that its change of view was influenced by the Fifth Circuit's decision in *Bryans* v. *Blackwell, supra.* But the language of that opinion, quoted *supra,* made no distinction between those sentenced before or after October 2, 1960, and affords no basis for the government's change of position subsequent to the filing of the complaint by petitioner.

II.

The government brings to the attention of the Court in footnote 1, p. 2, that petitioner filed a 2255 motion in the United States District Court for the Southern District of New York seeking credit for the pre-sentence custody. We filed this motion only because we thought it necessary to protect petitioner in the event this Court agrees with the Third Circuit that the courts below did not have jurisdiction of the question. However, it should be obvious that petitioner will not receive any effective relief on the question if he is required to litigate the point in the Southern District through an appeal to the Second Circuit, and back again to this Court. By that time the issue will be moot.

In our petition we asked the Court to grant certiorari so as to settle the appropriate procedures for prisoners to obtain judicial determination of their claims that they are being imprisoned beyond the term of their sentences. The need for such clarification is emphasized by the fact that the government now argues in its opposition in the Southern District of New York, that even if petitioner's claim is meritorious, he is not entitled to relief under 28 U.S. Code § 2255 at this time.

Respectfully submitted,

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